

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

No. 1:12-cv-00257-JB-LFG

vs.

LARRY A. GOLDSTONE,
CLARENCE G. SIMMONS, III,
and JANE E. STARRETT,

Defendants.

**DEFENDANT JANE STARRETT'S RESPONSE TO
NOTICE OF SUPPLEMENTAL AUTHORITY**

In another attempt to salvage its flawed scheme liability claim against Ms. Starrett, the SEC asks the Court to consider SEC v. Familant, 2012 U.S. Dist. LEXIS 179007 (D.D.C. Dec. 19, 2012), without mentioning the illegal scheme conduct at issue there. In Familant, one defendant allegedly issued “sham credits” for a “fake reason” to another defendant’s company, which repaid the credits with “hidden disbursements” for “bogus reasons” such as “fictitious repairs.” Id. at *1-4. Both defendants *knew* such “billing for phony services” was “illegal” and tried to conceal the fraud by instructing subordinates to “avoid round numbers” in the “fake invoices.” Id. at *7. Distinguishing SEC v. Kelly, 817 F. Supp. 2d 340 (S.D.N.Y. 2011), where “[t]here [was] nothing inherently deceptive” about the transactions in question, the Familant court held that this conduct – which “no innocent business dealings could explain” – constituted a scheme because it was deceptive independent of any public misrepresentations about the credits. Familant, 2012 U.S. Dist. LEXIS 179007, at *20-21, *33 (“No matter how accountants recorded them, these transactions would mislead.”). As such, Familant is inapposite to the

present case, and does not render Ms. Starrett's reliance on Kelly, SEC v. Lucent Techs., Inc., 610 F. Supp. 2d 342 (D.N.J. 2009), or other cases dismissing scheme liability claims "misplaced." Doc. 57 at 4-7; Doc. 66 at 2-10.

Here, the SEC has not alleged *any* such inherently deceptive conduct by Ms. Starrett, much less any such conduct independent of the purported misrepresentations. Familant is thus factually distinguishable and does not support a scheme claim against Ms. Starrett. Far from expanding the scope of scheme liability, Familant reaffirmed the limiting principle followed by Kelly and "[a]t least three circuit courts" that "'scheme liability' is viable only if Rule 10b-5(b) cannot fully cover the deceptive acts – that is, the 'scheme' must include deceptions beyond misrepresentations and omissions." Familant, 2012 U.S. Dist. LEXIS 179007, at *23-24. The SEC has alleged no such "deceptions." The SEC's scheme theory is not actionable under the rule applied in Familant because it is duplicative of the misrepresentation claims and thus fully covered by Rule 10b-5(b).

Dated: January 10, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 10, 2013, Defendant Jane Starrett's Response to Notice of Supplemental Authority was electronically filed with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record.

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